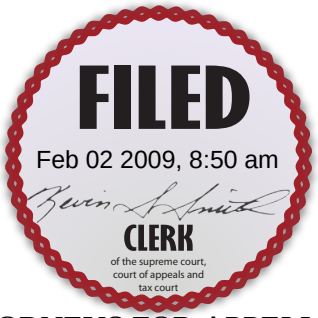

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IN THE
COURT OF APPEALS OF INDIANA

MAURICE CARTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0803-CR-262
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Dennis Carroll, Judge
Cause No. 48D01-0612-MR-00436

February 2, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After shooting three people in a motorcycle enthusiasts' clubhouse and killing one of them, Maurice Carter was found guilty by a jury of murder and two counts of attempted murder, and he pled guilty to carrying a handgun without a license. Carter now appeals only his convictions for attempted murder. On appeal, he argues that (1) the trial court committed fundamental error by failing to properly instruct the jury regarding the mens rea required to find him guilty of attempted murder, (2) there was a fatal variance between the charging information and the evidence presented at trial because he was not alerted that the State would rely upon the doctrine of transferred intent to convict him of attempted murder, and (3) the evidence is insufficient to sustain his convictions. Concluding that the trial court sufficiently informed the jury that it could only find Carter guilty of attempted murder if it found that he acted with specific intent to kill, that there was no variance between the charging information and the evidence presented at trial, and that the evidence is sufficient to sustain Carter's convictions for attempted murder, we affirm.

Facts and Procedural History

On December 9, 2006, an Indianapolis-based group called the Kentuckiana Gunslingers traveled to Anderson to attend a function hosted by an Anderson motorcycle club called the Brothers of the Wheel. In the early morning hours of December 10, the party moved to the Brothers of the Wheel's clubhouse, where people started dancing to music. Among the people on the dance floor were Carter, Delisha Dixon, Antwan Bradshaw, and Antonio "Big Tony" Jefferson, Sr.

Carter started "jumping around" to the music, Tr. p. 209, and he and Bradshaw bumped into each other, *id.* at 439. Several Kentuckiana Gunslingers, including Jefferson, decided to clear the dance floor. Suddenly, however, Carter produced a gun and shot twice at Bradshaw. Bullets struck Bradshaw in his abdomen and groin. Jefferson tried to knock the gun down, but Carter shot him, too, in the groin. *Id.* at 616, 618. Another bullet struck Dixon in her leg as she tried to escape the dance floor. *Id.* at 311-12. Dixon and Jefferson underwent surgery for their injuries and recovered. Bradshaw died as a result of his gunshot wounds.

The State charged Carter with murder,[1] two counts of attempted murder,[2] and carrying a handgun without a license.[3] After a jury trial, Carter was found guilty of murder and two counts of attempted murder, and he pled guilty to carrying a handgun without a license. The trial court sentenced Carter to an aggregate term of ninety-five years. Appellant's App. p. 10. Carter now appeals his convictions for attempted murder.

Discussion and Decision

Carter appeals only his convictions for attempted murder. He makes the following arguments on appeal: (1) the trial court committed fundamental error by failing to properly instruct the jury regarding the mens rea required to find him guilty of attempted murder, (2) there was a fatal variance between the charging information and the evidence presented at trial because Carter was not alerted that the State would rely upon the

[1] Ind. Code § 35-42-1-1(1).

[2] Ind. Code §§ 35-41-5-1; 35-42-1-1(1).

[3] Ind. Code § 35-47-2-1.

doctrine of transferred intent to convict him of attempted murder, and (3) the evidence is insufficient to sustain his convictions for attempted murder.

I. Jury Instruction

Carter first contends that the trial court erred by failing to properly instruct the jury regarding the mens rea required to find him guilty of attempted murder. It is well-established that the law requires an instruction setting forth the elements of attempted murder to include "that the defendant, with the intent to kill the victim, engaged in conduct which was a substantial step toward such killing." *Spradlin v. State*, 569 N.E.2d 948, 950 (Ind. 1991). Carter acknowledges that he did not object to the challenged instruction at trial or tender a correct instruction, and his argument regarding the jury instruction must therefore be based upon a theory of fundamental error. *Hopkins v. State*, 759 N.E.2d 633, 638 (Ind. 2001). Fundamental error is a "substantial, blatant violation of due process." *Id.* In order to be deemed fundamental and warrant reversal, the error must be so prejudicial to the rights of a defendant to make a fair trial impossible. *Id.* Where the defendant's intent was vigorously contested or the trial court's instructions did not sufficiently inform the jury regarding specific intent, a *Spradlin* error *may* rise to the level of fundamental error and warrant reversal. *Jones v. State*, 868 N.E.2d 1205, 1210 (Ind. Ct. App. 2007) (citing *Williams v. State*, 737 N.E.2d 734, 737 (Ind. 2000)), *trans. denied*.

Regarding Carter's two attempted murder charges, the trial court instructed the jury as follows:

> The crime of Attempted Murder is charged under Counts II and III and is defined by statute as follows: A person who knowingly kills another human

> being commits murder, and a person attempts to commit murder when acting with the culpability required for the commission of the murder, he engages in conduct that constitutes a substantial step toward the commission of the murder. The crime of Attempted Murder is a Class A felony. To convict the defendant of Attempted Murder, the State must have proved each of the following elements, as to each charge, of Attempted Murder. The defendant, 1) acting with the specific intent to commit murder, 2) did discharge a firearm at Delisha Dixon as to Count II or to Antonio Jefferson as to Count III, and then the third element, which was conduct constituting a substantial step toward the commission of the intended crime of murder. If the State failed to prove each of these elements beyond a reasonable doubt, you should find the defendant not guilty of the Attempted Murder charge. If the State did prove each of these elements beyond a reasonable doubt, you should find the defendant guilty of the crime of Attempted Murder, a Class A felony. Specific Intent for Attempted Murder is intent to achieve death, rather than intent to engage in conduct which carries with it a risk of death.

Tr. p. 803-04; Appellant's App. p. 131 (citing Ind. Pattern Jury Instruction 2.01). Carter argues that this instruction regarding attempted murder did not sufficiently inform the jury that it was required to find that he acted with specific intent. He acknowledges that the trial court "did include an element of specific intent to commit murder" in its attempted murder instruction. Appellant's Br. p. 6. However, he argues that the instruction as a whole is ambiguous. Carter points out that the trial court instructed the jury, in part, that a person attempts to commit murder when committing a substantial step toward murder while "acting with the culpability required for the commission of the murder[.]" Tr. p. 803. Because the mens rea required for a conviction for murder is either that the defendant acted "knowingly or intentionally," Ind. Code § 35-42-1-1, Carter contends that the jury was erroneously instructed that it could find him guilty of attempted murder for acting "knowingly" rather than with specific intent. Appellant's Br. p. 7. Carter points also to the charging information for the two counts of attempted

murder, which the trial court read to the jury immediately before giving the attempted murder instruction, and contends that this compounds the risk of ambiguity. The charging information for the two counts of attempted murder "allege[d] that . . . Carter did knowingly take a substantial step toward the commission of the crime of Murder to wit: Maurice Carter did knowingly or intentionally shoot [Dixon and Jefferson] with the intent of killing [Dixon and Jefferson]." Tr. p. 801-02.

We conclude that the instructions presented to the jury, taken as a whole, sufficiently informed the jury that, in order to convict Carter of the two counts of attempted murder, it had to find that he acted with the specific intent to kill Dixon and Jefferson. Here, although the trial court's instruction contained language that might have, by itself, misled the jury to believe that it could convict Carter of attempted murder if he acted "knowingly" rather than with specific intent, *id.* at 803; *see Ramsey v. State*, 723 N.E.2d 869, 872 (Ind. 2000) (describing the presence of "knowingly" language in an attempted murder instruction as "highly problematic"), we do not read segments of a trial court's jury instructions in isolation, *Price v. State*, 765 N.E.2d 1245, 1252 (Ind. 2002). Rather, we consider the instructions as a whole. *Id.* Even if one portion of the instruction is erroneous, "[i]f some other instruction adequately inform[ed] the jury that [it] must find that [the] defendant had the 'intent to kill' then there is no fundamental error." *Yerden v. State*, 682 N.E.2d 1283, 1286 (Ind. 1997) (citing *Beasley v. State*, 643 N.E.2d 346 (Ind. 1994)). In this case, after instructing the jury on the components of attempted murder as provided in the Indiana Code provision regarding "attempt" generally,[4] *see*

[4] The statutory provision regarding the components of the offense of general applicability "attempt" provides in part: "A person attempts to commit a crime when, acting with the culpability

Ind. Code §§ 35-41-5-1; 35-42-1-1(1), the trial court proceeded to instruct the jury that the State must prove that Carter "act[ed] with the specific intent to commit murder," Tr. p. 803. Further, the trial court ended its instruction on attempted murder with an explanation that specific intent for attempted murder means that the defendant intended to kill: "Specific Intent for Attempted Murder is *intent to achieve death*, rather than intent to engage in conduct which carries with it a risk of death." *Id.* at 804 (emphasis added). We conclude that the trial court's latter statements to the jury sufficiently informed the jury that it could only find Carter guilty of attempted murder if it found that he acted with specific intent to kill.

We find support for our conclusion in *Ramsey v. State*, a decision from our Supreme Court that addressed similar instructions to the ones we review today. In *Ramsey*, the Court reviewed jury instructions for *Spradlin* error. The first sentence of the trial court's attempted murder instruction read, "A person attempts to commit murder when, acting with the culpability required for commission of Murder, he engages in conduct that constitutes a substantial step toward commission of Murder; which is to knowingly or intentionally kill another human being." *Ramsey*, 723 N.E.2d at 872 (citation to the record omitted). The trial court further instructed the jury that the State was required to prove "specific intent to kill" and read the charging information, which articulated the proper mens rea. *Id.* Finding that the first instruction "indicate[d] that a 'knowing' mens rea is sufficient to establish guilt of attempted murder" and was therefore erroneous, the *Ramsey* Court nonetheless concluded that "[b]ecause the correct

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required for the commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime attempted." I.C. § 35-41-5-1.

mens rea was enumerated both as an element in the charging instrument and as an element that the State was required to prove beyond a reasonable doubt," the jury instructions as a whole sufficiently informed the jury that the State had to prove that the defendant acted with specific intent to kill the victim. *Id.* at 872-73.

In the case before us, it is true that (unlike in *Ramsey*) the attempted murder charging information referenced an improper mens rea. Appellant's App. p. 16-17 ("Carter did *knowingly* take a substantial step towards the commission of the crime of murder, to wit; . . . Carter did *knowingly or intentionally* shoot [the victims] . . . .") (emphasis added); Tr. p. 801-02. However, the charging information followed this language with the allegations that Carter shot Dixon and Jefferson "*with the intent of killing*" them. Appellant's App. p. 16-17 (emphasis added); Tr. p. 801-02. This allegation, coupled with the trial court's instruction enumerating "acting with the specific intent to commit murder" as an element of attempted murder that the State must prove, Tr. p. 803, and the trial court's explanation to the jury that specific intent for attempted murder means that the defendant intended to kill, *id.* at 804, sufficiently informed the jury that it could only find Carter guilty of attempted murder if it found that he acted with specific intent to kill.

II. Fatal Variance

Carter next argues that there was a fatal variance between the charging information for attempted murder and the evidence presented at trial because the charging information alleged that he intended to kill Dixon and Jefferson, while the evidence produced at trial reflected that he intended only to kill Bradshaw.

"A variance is an essential difference between the pleading and the proof." *Mitchem v. State*, 685 N.E.2d 671, 677 (Ind. 1997) (quotation omitted). "Not all variances between allegations in the charge and the evidence at the trial are fatal." *Id.* (quotation omitted). To ascertain whether a variance between the proof at trial and a charging information or indictment is fatal, we employ the following test:

> (1) was the defendant misled by the variance in the evidence from the allegations and specifications in the charge in the preparation and maintenance of his defense, and was he harmed or prejudiced thereby;
>
> (2) will the defendant be protected in the future criminal proceeding covering the same event, facts, and evidence against double jeopardy?

Id. (quoting *Harrison v. State*, 507 N.E.2d 565, 566 (Ind. 1987)).

At the conclusion of Carter's trial, the court instructed the jury as follows regarding the doctrine of transferred intent:

> Ladies and gentlemen, under Indiana law, if a defendant specifically intends to cause the death of some person but by mistake or inadvertence injures some other person, his specific intent to kill is transferred from the person to whom it was directed to the person actually injured. This is referred to as the doctrine of Transferred Intent.

Tr. p. 804. Carter contends that the State's ability to proceed under the doctrine of transferred intent resulted in a fatal variance because he was misled by the charging information and was prejudiced when convicted of two counts of attempted murder.[5] This argument fails. Our Supreme Court has addressed this issue in the past and held that there was no fatal variance. In *Matthews v. State*, 237 Ind. 677, 148 N.E.2d 334 (1958),

[5] Carter also contends that "he is now in jeopardy of being brought back to trial upon allegations that he, in fact, did intend to kill Delisha Dixon and Antonio Jefferson." Appellant's Br. p. 9-10. As the State points out in its brief, however, this argument is without merit. Carter has been convicted of the attempted murder of both Dixon and Jefferson and cannot be tried again for the attempted murders while these convictions stand.

the defendant was charged with assault and battery with intent to murder the victim, but the evidence at trial showed that the defendant actually intended to murder a different person. On appeal of his conviction, the defendant alleged that "there was a variance in the proof which misled him in his defense" and that the trial court erred in instructing the jury on the doctrine of transferred intent. *Id.* at 335. Citing an earlier case in which the Court had rejected this argument, *Noelke v. State*, 214 Ind. 427, 15 N.E.2d 950 (1938), our Supreme Court held that the defendant's "complaint of the variance between the affidavit and the proof [wa]s without merit." *Matthews*, 148 N.E.2d at 335. Our Supreme Court has since reaffirmed the validity of its decision in *Matthews*. *Taylor v. State*, 260 Ind. 264, 295 N.E.2d 600, 606 (Ind. 1973). In light of *Matthews*, we conclude that there was no fatal variance between the charging information and the evidence supporting Carter's attempted murder convictions.

III. Insufficient Evidence

Finally, Carter argues that the evidence is insufficient to support his convictions for the attempted murders of Dixon and Jefferson. He contends that "there is a total absence of evidence to suggest that Carter intended to harm Delisha Dixon." Appellant's Br. p. 10. Further, Carter contends that Jefferson's testimony that Carter shot him twice, rather than once, was incredibly dubious and that Carter's conviction for attempting to murder Jefferson is therefore unsupported by the evidence. *Id.* at 11.

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the factfinder's role,

not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider only the evidence most favorable to the trial court's ruling. *Id.* Appellate courts affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* (quotation omitted). It is therefore not necessary that the evidence "overcome every reasonable hypothesis of innocence." *Id.* at 147 (quotation omitted). The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.*

To support Carter's convictions for two counts of attempted murder, the evidence must establish that Carter, acting with the intent to kill, took a substantial step toward killing Dixon and Jefferson. *Bethel v. State*, 730 N.E.2d 1242, 1245 (Ind. 2000). The intent to kill may be inferred from the deliberate use of a deadly weapon in a manner likely to cause death or serious injury. *Id.* Our Supreme Court has found sufficient evidence for a conviction where the evidence indicated that a weapon was fired in the direction of the victim. *Id.* (citing *Shelton v. State*, 602 N.E.2d 1017, 1021 (Ind. 1992); *Owens v. State*, 544 N.E.2d 1375, 1377 (Ind. 1989); *Brumbaugh v. State*, 491 N.E.2d 983, 984 (Ind. 1986)).

Carter's challenge to the sufficiency of the evidence of his intent to kill Dixon fails. The State concedes that there is no evidence that Carter intended to shoot Dixon. Appellee's Br. p. 8-9 (citing Tr. p. 712). However, under the doctrine of transferred intent, "a defendant's intent to kill one person is transferred when, by mistake or

inadvertence, the defendant kills a third person[.]" *Blanche v. State*, 690 N.E.2d 709, 712 (Ind. 1998) (citing *White v. State*, 638 N.E.2d 785, 786 (Ind. 1994)). It is settled law that the doctrine of transferred intent also applies to the specific intent necessary for attempted murder. *Id.* (citing *Straub v. State*, 567 N.E.2d 87, 90-91 (Ind. 1991)). Here, the jury heard testimony that Carter intentionally shot Bradshaw after an altercation developed between the two men on the dance floor of the Brothers of the Wheel's clubhouse. Tr. p. 472-73. Bradshaw died as a result. Carter was convicted of murder, and he makes no argument on appeal that the conviction for murder is based upon insufficient evidence. Because the State presented evidence that Carter acted with the intent to kill Bradshaw, the doctrine of transferred intent renders Carter criminally liable if, "by mistake or inadvertence," his conduct targeted toward Bradshaw harmed a third person. *Blanche*, 690 N.E.2d at 712. Dixon, who fled from the dance floor after hearing gunshots, was hit in the leg by one of the bullets fired from Carter's gun. Tr. p. 311-12. Under the doctrine of transferred intent, the evidence is sufficient to support Carter's conviction for the attempted murder of Dixon.

Carter's challenge to his conviction for the attempted murder of Jefferson also fails. His sole contention in this regard is that Jefferson's account of the shooting is incredibly dubious and that there is therefore insufficient evidence to support this attempted murder conviction. The "incredible dubiosity rule" provides that a court may "impinge on the jury's responsibility to judge the credibility of witnesses only when confronted with inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity." *Murray v. State*, 761 N.E.2d 406, 408

(Ind. 2002). The application of this rule is limited to where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the defendant's guilt. *James v. State*, 755 N.E.2d 226, 231 (Ind. Ct. App. 2001), *trans. denied*. "[A]pplication of this rule is rare and . . . the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no person could believe it." *Stephenson v. State*, 742 N.E.2d 463, 497 (Ind. 2001) (citation omitted).

Carter contends that Jefferson's testimony at trial was incredibly dubious because Jefferson testified that Carter shot him twice but "is the only witness in the trial who testified that Carter shot at anyone other than Mr. Bradshaw more than once." Appellant's Br. p. 11. First, we observe that Carter misunderstands the application of the incredible dubiosity rule. Again, the application of this rule is limited to those cases where a sole witness presents inherently contradictory testimony and there is a total lack of circumstantial evidence of the defendant's guilt. *James*, 755 N.E.2d at 231. Here, Jefferson was not the sole witness to testify that Carter shot him. *See* Tr. p. 215 (witness Melvin Watson testified that he saw Carter shoot Jefferson). Further, it is unclear how Carter believes that any discrepancy between Jefferson's claim that Carter shot him twice and the hospital's removal of only one bullet somehow exonerates him. There is no dispute about whether Carter shot Jefferson at least once. Because Carter shot Jefferson in response to Jefferson trying to push his gun down, and the intent to kill may be inferred from the deliberate use of a deadly weapon in a manner likely to cause death or

serious injury, the evidence is sufficient to sustain Carter's conviction for the attempted murder of Jefferson. *Bethel*, 730 N.E.2d at 1245.

Affirmed.

RILEY, J., concurs.

DARDEN, J., concurs in result.